U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

IN THE MATTER of'

ILLINOIS MIGRANT COUNCIL, INC.
Complainant,

v.

Case No. 84-JTP-10

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

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For the Respondent

Before: CHARLES P. RIPPEY
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Job Training Partnership Act (hereafter referred to as JTPA), 29 U.S.C. $1501 - 1781, Pub. L. 97-300, 96 Stat. 1324, and the Rules and Regulations issued thereunder, found at Title 20 of the Code of Federal Regulations and concerns a protest of the Illinois Migrant Council (hereafter referred to as IMC) against the non-award of a Department of Labor (hereafter referred to as DOL) Migrant and Seasonal Farmworker Youth Program Grant. This decision reverses the Grant Officer's non-selectiondetermination.

JTPA replaced the Comprehensive Employment and Training Act (hereafter referred to as CETA) as the federal program for providing job training to youth, unskilled adults, economically disadvantaged individuals and others facing serious barriers to employment. It became effective October 13, 1982. The transition provisions state that until September 30, 1983, the Secretary shall provide financial assistance in the same manner than such assistance was provided under CETA. 29 USC 1591(a). The transition provisions also provide that regulations issued under CETA remain in effect until modified or revoked. 29 USC 1591(d).

DOL announced the grant at issue in this proceeding in a Notice of Solicitations of Grant Applications published on February 8, 1983. 48 F.R. 5822. This grant awarded funds to implement programs for eligible youth who are members of Migrant and Seasonal Farmworker Families for Program Year 1983 (July 1, 1983 - June 30, 1984), as authorized by Title IV, Part A, Subparts 2 and 3 of CETA at Sections 433(a)(4) and 423(b) and §181 of JTPA. Therefore, JTPA, the statute in effect regarding job training programs at the time of this solicitation authorized the award of this grant; however, CETA and regulations promulgated thereunder, which the transition provisions of JTPA incorporated by reference, provided the standards for the award of the grant.

IMC was one of 39 applicants that submitted a proposal for funding (AF, Tab C)[1/]. IMC's proposal used a multi-state, year-round program model. A three member review panel comprised of Chairman Edward Dassing, and members, Brenda Hernandez and Randall Moncrief, gave an initial evaluation of the applicants based strictly on the contents of the proposals. The Employment and Training Administration of DOL determined that only those applicants receiving an initial score of 63 or more would be considered for a final rating which included an evaluation of past performance (AF, Tab B). Consequently, on June 30, 1983, IMC was formally notified of its non-selection (AF, Tab A). IMC filed a Petition for Reconsideration; however, the initial decision of the Grant Officer not to award a grant to IMC was sustained (AF, Tab A). On August 5, 1983, IMC formally requested a hearing with respect to its non-selection before this Office.

1/ All references to the Hearing Transcripts of February 22, 1985, May 21, 1985, the Administrative File and IMC's exhibits will be noted by the letters T I, T II, AF and IMC, respectively. References to the depositions of Dassing, Hernandez and Moncrief will be noted by the letters D, H, and M, respectively.

IMC's proposal received an initial panel rating score of 59; therefore, it was not given a final rating which considered past performance. Since the Solicitation of Grant Applications (hereafter referred to as SGA) stated that past performance would be a factor used in the evaluation of applications, I ordered the Grant Officer to assign each of the applicants a score for past performance and then give each applicant a final rating. See Order of March 22, 1984. The Grant Officer responded saying that IMC would have received a final rating of 61.2/ See Affidavit of Edward Tomchick, Grant Officer, April 25, 1984 and attachments thereto. Since only applicants who had a final rating of 62 received grants, the Grant Officer stated that even with an evaluation of past performance IMC would not have received grant money.

Throughout these proceedings, DOL has contended that this case has been rendered moot due to the expiration of the grant period and because JTPA has no provision authorizing migrant youth grants (T I, p. 1196, Grant Officer's Renewed Motion to Dismiss on the Ground of Mootness - January 25, 1985).

Expiration of the grant period does not render this case moot. JTPA specifically provides for a right of review for all disappointed grant applicants. 29 USC $1576. Moreover, the relevant provisions of CETA regulations, 20 CFR $689.503 and 20 CFR §§676.90, 676.91, allow disappointed grant applicants a right to hearing and do not preclude review after expiration of the grant period. Since the grant period has expired, it would be inappropriate for me to award retroactive relief. However, both JTPA and the regulations under CETA do not limit the remedies-available to a disappointed applicant. Interestingly, cases cited by DOL in support of its contention that this case is moot all involve CETA applicants who were seeking retroactive award of a grant or an injunction to prevent the Secretary from funding a grant.

DOL also contends because JTPA has no provision for migrant youth programs which existed under CETA, this case is moot. Section 1672 refers to programs assisting farmworkers and their dependents. Accordingly, migrant youth grants could be funded under this section. Additionally, IMC undertakes both youth and adult training programs, thereby it has a vested interest in the outcome of this case and any impact it might have on other grant applications.

2/ Calculation of the final score was made according to the following formula: the addition of the initial proposal score multiplied by .85 and the past performance score by .15.

At the hearing on May 21, 1985 counsel waived their right to present testimonial evidence and agreed to have this case decided on the record (T II, pp. 2-4). Although IMC had indicated an intent to offer an affidavit in lieu of testimony, to which DOL could counter with another affidavit (T II, p. 32), IMC declained to do so. However, DOL included an affidavit of the Grant Officer, dated August 26, 1985 with its brief filed September 6, 1985. The admission of this affidavit into evidence at this time is inappropriate and therefore is denied. The parties agreed that DOL could submit a counter-affidavit limited to matters raised in IMC's affidavit (T II, p. 32). IMC's failure to submit its affidavit post-hearing precluded DOL from submitting an affidavit post-hearing. Additionally, DOL had the opportunity to submit this evidence prior to the close of the hearing which would have allowed response from IMC. Therefore, this affidavit will not be admitted as part of the record in this case.

The standard of review for this case is set out in 20 CFR $633.205(e) which states that there may be an administrative review "with respect to whether there is a basis in the record to support the Department's decision." This standard is akin to the standard applied in government procurement cases where the validity of an exercize of discretion may be challenged only upon a clear showing that the agency action was arbitrary or capricious or an abuse of discretion or was not in accordance with the law. See Tackett v. Schaffner, Inc. v. United States 633 F.2d 940 (ct. Cl 1980). To overturn the Grant Officer's decision, IMC must prove that the decision lacks any rational basis. See Wroblaski v. Hampton, 528 F.2d 852 (7th Cir. 1976). IMC has the burden of establishing the facts and entitlement to relief. 20 C.F.R. §636.10(9).

IMC asserts that the panelists were unqualified to evaluate the proposals and thereby could not make decisions which had a rational basis. The process for selection of the review panel members is given in the Review Panel Instructions. (hereafter referred to as the instructions)(AF, Tab E). The instructions do not state that the panelists must have experience with or exposure to the types of programs for which the grant is being awarded. In fact, the instructions state that a maximum of 50% of the panelists may come from the Office with program responsibility for the SGA. Therefore, I find that the lack of experience with migrant youth programs is not per se evidence of an inability to render a grant award decision with any rational basis. Lack of credentials becomes an issue only if IMC shows that the panelists had a lack of credentials which led to arbitrary and capricious decision-making.

In evaluating the applicants, the Review Panel was limited to the "Guidelines for Evaluation" specified in the instructions. Where an agency sets out procedures which it intends to be binding the agency will be held to those procedures. In re Migrant Action Program, Inc. 79 CET 290 (December 12, 1980). See also Vitarelli v. Seaton, 359 U.S. 538 (1939), Mazaleski v. Truesdell, 562 F.2d 701 (1977). Since the language of the instructions is unmistakably mandatory, by the use of words such as "must", "required", "shall", I find the instructions were intended to bind the Grant Officer and the Review Panel.

If the panelists did not adhere to the procedures listed in the instructions, then the process will be deemed to lack any rational basis. See Migrant Action, 79 CET 290. Specifically the instructions provide: " The cardinal rule for Panel Members is to proceed in accordance with the rules established in the SGA and in this manual in order to assure a fair and objective review and evaluation." (Instructions, p. 8). Moreover, the instructions emphasize that panelists should not add their own rating criteria to those of the SGA (Instructions, pp. 5, 9). Thus, I find that the criteria by which the panelists are to evaluate the proposals are strictly limited by those stated in the SGA. Accordingly, if the criteria used by the panelists differ from those listed in the SGA, their decision will be deemed to lack a rational basis.

Furthermore, in addition to giving each criterion a nuamerical rating, the instructions require that the panelists include a description of strengths and weaknesses for each criterion (Instructions, p. 9). Accordingly, the determination of whether the panelists complied with the SGA criteria will be limited to the comments listed in the rating sheets[3]/ and the panelists' testimony about the comments on those sheets.

3/ DOL moved for a protective order to prevent the discovery of all of the review panel score sheets, based on an assertion of deliberative process privilege. This motion was denied since the review panel's job was to evaluate and rate the applications, a function which does not involve any DOL policy or legal considerations. See Order of July 6, 1984; Order of October 10, 1984 of Under Secretary Ford B. Ford. Moreover, the instructions anticipate the use of these score sheets to support the government's case in appeal decisions (Instructions, p. 9). Subsequently, DOL produced 101 out of 117 individual panelist score sheets and 35 of 39 panel summaries.

The SGA listed five rating criteria: Quality of Application-Program Approach: Administrative Capability; Delivery System; Linkages and Coordination: and Responsiveness to Youth. Each criterion was evaluated based on factors listed in the SGA (SGA, pp. 8-9). In assigning point values panelists were free to assign their own weights to the factors listed for each criterion. It is not my function to substitute my judgment for the judgment of the panel, but rather to determine whether the panel's decision had any rational basis.

IMC asserts that the panel did not adhere to the rating criteria factors listed for the first four criteria. For the first criterion--Quality of Application-Program Approach[4]/ IMC contends that the panelists improperly considered job placement rates. As stated in the Jones Memorandum concerning the 1983 competition, "job placement rates were not considered as they are not particularly relevant for youth programs where the primary focus is lowering drop-out rates." (AF, Tab B).

Each of the panelists commented about placement on his rating sheet. Dassing commented, "% placement rate confusing due to discrepency in numbers to be trained:" Hernandez commented, "46% placement" and Moncrief commented "77% planned placement rate." (IMC 5, Tab 19).

4/ Rating Criteria: Quality of Application Program Approach:

> Applicants will be judged by the degree to which they demonstrate a clear understanding of their plan to meet target youth population needs, i.e.:
>
> 1. Rationale for Selection of Approach:
>
> 2. Planned level of services to be provided (direct, indirect, subcontract):
>
> 3. Benefits that will accrue or have accrued to youth participants, including performance and placement goals for each program activity, and objectives for which there is a reasonable expectation of successful completion within the grant period.
>
> 4. Statement of work is in line with the format outline in this SGA (SGA, p.8).

Dassing's comments do not specify that he considered job placement rate. However, his failure to obtain a "placement rate" indicates that included in his calculation was a job placement rate since a calculation of job placement rate would be difficult to compute for a program which emphasized educational training. Even assuming that Dassing considered job placement rate, IMC has not met its burden of proof in showing that Dassing penalized IMC for this reason. Nowhere in the record is there any indication that Dassing downgraded IMC since he could not calculate a placement rate. Therefore, I find that Dassing's evaluation of this criterion did not lack a rational basis.

Hernandez testified that her calcuation of the placement rate was based on retention of participants in school or work experience (H-45). Moncrief testified that his calculation was based on the numbers noted on IMC's application summary sheet, which included indirect placements, direct placements and additional positive terminations (M-347-357). The testimony of these panelists indicates the placement rate each used in his respective evaluation of the proposals was not equal to the job placement rate. The SGA rating criteria includes placement goals; however, it does not state how these calculations are to be made. Thus, I find that Hernandez and Moncrief did not act in an irrational manner, by considering a placement rate in the evaluation of this criteria.

Accordingly, I find that the panel as a whole did not improperly consider job placement rates in its evaluation.

Additionally, IMC contends that Moncrief did not rate the proposals consistently since he found another applicant, Campensinos Uniedos (CUI) to have a planned placement rate of 48% and awarded it 19 points for this criterion and found IMC to have a planned placement rate of 77% and awarded it only 16 points (IMC 5, Tabs 3 and 19). Although it is true that similar proposals must be scored similarly, placement was only one of several factors listed for evaluation under this criterion. Moncrief's comments 5/ indicate that he did

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5/ CUI: planned placement 48% good
good program mix--good experience factor
overall, above averagfe (IMC 5, Tab 3)

IMC: planned placement rate of 77%
approach--average
follows SGA format
overall slightly above average (IMC 5, Tab 19)

consider other factors in assigning point values. Since the panelists were free to assign their own weights to the different factors, I find it was not an abuse of discretion for Moncrief to award more points to CUI.

For the second criterion--Administrative Capability,6/ IMC contends that the panel improperly penalized IMC for high administrative costs and high costs per participant.

The SGA stated that administrative costs were not to exceed 20% (SGA, p. 7). However, this is a repetition of the regulation issued pursuant to CETA, found at 20 CFR §676.40-2 relating to administrative costs. The limitation is not stated as a factor for evaluation under this criterion.

Each panelist listed IMC's 19.5% administrative costs as a comment on his rating score sheet (IMC 5, Tab 19). Moreover, each panelist testified that if IMC's administrative costs had been lower, it would have received more points (D-122-125, H-55, M-148).

In particular, both Dassing and Moncrief testified that they did not consider program design in evaluating the cost effectiveness of IMC's proposal (D-23, M-151). In fact, Moncrief acklnowledged that program design affects administrative costs and agreed that a multistate year-round program model would have items of administrative cost, such as travel and office coordination which would not be incurred by any other program (M-193-198). This failure to consider program design was a clear violation of the SGA and the instructions. Therefore, I find that Dassing's and Moncrief's evaluation of cost effectiveness lacked a rational basis.

Additionally, Hernandez testified that she speculated that IMC's administrative costs might exceed 20%. (H-81) It was not the function of the panelists to speculate about potential compliance with the grant requirements and the corresponding regulations. The panelists were to evaluate

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6/ Rating Criteria: Administrative Capability:

> Applicants shall be rated on their proven ability to operate a cost-effective program which provides timely and effective services within the period of performance; the degree to which the total program cost appears reasonable relative to the program design; that cost per participant appears reasonable relative to the training and program design: and the budgeted cost categories appear appropriate and reasonable.

the applicants based strictly on the proposals. Essentially, Hernandez added her own evaluation factor to those listed in the SGA. Thus, I find her evaluation of cost effectiveness lacked a rational basis.

Accordingly, I find that if the panelists had evaluated cost effectiveness in relation to program design in compliance with the SGA, IMC would have received at least 3 more points (one point per panelist).

IMC also asserts that the panel erred in its evaluation of cost per participant since the panelists failed to consider it in relation to the type of training and program design. Instead of calculating cost per participant by dividing the cost of the particular training program (classroom training and on the job training) by the number of participants in that program, the panelists calculated cost per participant by dividing the total training funds by the total number of enrollees (D-34, H-73-74, M-163, 172). Thus, the cost per participant of programs emphasizing employment traiining services was compared to the cost per participant of programs emphasizing classroom training. Clearly, the panelists compared dissimilar programs as if they were similar. The SGA states that this factor is to be evaluated in terms of training and program design: therefore, the panelists failed to comply with the SGA. Accordingly, I find that their evaluation of cost per participant lacked any rational basis.

Additionally, all three panelists stated that IMC would have received more points if its cost per participant had been lower (D-23,32, H-68, M-178). Thus, I find that the panelists would have awarded IMC at least 3 additional points (one point per panelist) if the evaluation of cost per participant had been done in accordance with the SGA.

In total for this criterion, IMC lost at least 6 individual points due to the failure of the panel to comply with the SGA.

For the third criterion--Delivery System[7/], IMC asserts that it was penalized for failing to address frequency of

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7/ Rating Criteria: Delivery System:

> The applicant's demonstrated and/or potential ability to deliver the proposed program, the appropriateness of the plan, and its potential for meeting the long-term employability needs of farmworker youth (SGA, p. 9) .

follow-up, when in fact IMC did list frequency of follow-up. **IMC** also contends that frequency of follow-up was an improper factor for the panelists to consider.

Although frequency of folow-up is not specifically listed under this criterion, follow-up is noted as part of the "method of delivery" (SGA, p. 5). Therefore, frequency of follow-up is not beyond the scope of the "delivery" factor and could be considered by the panel. Moreover, minimum frequency of follow-up is stated at 20 CFR §689.502(b)(2); thus the panelists could properly determine if the proposal met the regulatory minimum.

IMC addressed the frequency of follow-up in a chart captioned "Participant Flow-through Delivery System"--where IMC stated that it would conduct participant follow-up on a 30, 60, 90 day basis (AF, Tab D).

Panelists Dassing and Moncrief each noted IMC's failure to address frequency of follow-up on their rating sheets. Both panelists testified that this was a negative comment (D-147, M-219). Additionally, failure to address frequency of follow-up was listed as a comment on the panel summary sheet. Furthermore, Dassing stated that he might have added a point if IMC had addressed frequency of follow-up (D-143).

Therefore, since two of the panelists penalized IMC for failing to include an item in its proposal, which in fact was included and since this factor influenced on the panel as a whole, as evidence by the comment on the panel summary sheet, I find that the evaluation under this criterion lacked a rational basis.

Moreover, I find that Dassing and Moncrief each would have awarded IMC at least 1 additional point, if he had realized that IMC had listed its frequency of follow-up.

For the forth criterion - Linkages and Coordination 8/ IMC contends that it was inappropriately penalized for failing to list private sector linkages. IMC asserts that private sector linkages are inappropriate for its model

Although IMC contends that private sector linkages are inappropriate for its model, it fails to make this point in its proposal. Moreover, the factors listed under this criterion do not state that linkages should be evaluated in relation to program design. Accordingly, I find that the panel did not act in an arbitrary or capricious manner when it considered IMC's lack of private sector linkage in evaluating this criterion.

In conclusion, the panel's evaluation of two criteria, Administrative Capability and Delivery Systems, lacked any rational basis. Therefore, the panel's complete evaluation of the grant proposals lacked a rational basis. Moreover, since the grant officer based his decision strictly on the panel's evaluation, his decision not award IMC a grant lacked any rational basis.

Based on the testimony of the panelists, I find that IMC would have been awarded an additional 8 individual points for an amended panel score of 62 before past performance evaluation.9/ IMC's final score would have been 64 (See footnote 2).

The top 10 ranked proposals, using 62 as the cutoff score, received grant money. Clearly, if IMC's proposal had been evaluated in accordance with the SGA, IMC would have been above the cutoff score. It is unclear as to whether IMC would have been within the top 10 proposals had all of the proposals been evaluated in accordance with the SGA. However, this is not the burden of proof IMC must meet to be entitled to relief. Rather, IMC has met its burden of proof by showing that the grant officer's decision lacked a rational basis.

Since the transition provisions of JTPA which control this case provide that finding should be granted in accordance with the CETA regulations, it is appropriate to award relief according to the provisions of CETA.

Section 676.91(c) provides that the ALJ shall have the full authority of the Secretary in ordering relief. Orders for relief may contain such terms and corrective action as are consistent with and will effectuate the purposes of CETA and the regulations thereunder. 20 C.F.R. $676.91(c). Since this case comes under the transition provisions of JPTA, which implement the provisions of CETA, the remedy should be fashioned so that it is consistent with both Acts.

9/ IMC's individual panelist score would be increased to 185. Dividing by 3 to obtain the panel score, IMC would receive 62 points.

As previously discussed, it is inconsistent with the purposes of the JTPA to award IMC the grant money which would have been distributed from CETA funds. Moreover, it is inappropriate for me to designate IMC as a future JTPA grantee for migrant youth grants, since currently, migrant youth program grants are not being used under JTPA.

IMC continues to apply for JTPA grants. Therefore, for all past performance evaluations for future grants to which IMC applies, IMC shall be considered to have been a grant recepient of a program year 1983 Migrant Youth Program Act. Moreover, for evaluation purposes IMC is to be credited with actual performance equal to anticipated performance.

DOL contends that the Equal Access to Justice Act (EAJA) does not apply to this case. Specifically, DOL asserts that EAJA is inapplicable under CETA. However, the CETA regulations apply to this case only because they are incorporated by reference by the transition provisions of JTPA. Therefore, the provisions of JTPA will determine if EAJA applies.

DOL's regulations regarding EAJA state that an eligible party may receive an award when it prevails over an agency, unless the agency's position in the proceeding was substantially justified or special circumstances make an award unjust. 20 C.F.R. $16.101. Specifically, DOL asserts that the regulations under 29 C.F.R. $16. 104 do not include this type of proceeding in a list of proceedings which DOL has determined that attorney's fees may be recovered under EAJA. However, I find that the proceedings in which EAJA applies, listed in 29 C.F.R. $16.104 are merely examples--§16.104 is is not intended to be an exhaustive list.

The EAJA applies to any adversary adjudication pending before DOL at any time between October 1, 1981 and September 30, 1984 20 C.F.R. $16.103. Section 504(b)(l)(c) of EAJA defines adversary adjudication as an adjudication under 5 USC $554 in which the government is represented by counsel. An adjudication under 5 U.S.C $554 is one required to be determined on the record after an opportunity for agency hearing. JTPA provides a right of hearing before an ALJ to any dissatisfied applicant for financial assistance. 29 U.S.C. $1572. DOL's regulations provide thathearings before ALJ's are to be determined on the record 29 C.F.R. §§18.52 - 18.59. It follows then, that this proceeding is an adjudication under 5 U.S.C. $554 and accordingly EAJA applies.

1 have discussed the applicability of EAJA in light of DOL's assertions that this case was rendered moot by the lack of relief available to IMC and by the fact that even attorney's fees could not be awarded under EAJA. However, at this time, an award of attorney's fees is appropriate since IMC's counsel has not filed an application for fees pursuant to EAJA.

ORDER

It is hereby ordered that for all future Department of Labor grants for which the Illinois Migrant Council applies, it is to be credited with past performance of a Program Year 1983 Migrant Youth Program Grant equal to the anticipated performance rates set out in its Funding Request.

Pursuant to 20 C.F.R. $676.91(f), this Decision and Order constitutes the final action of the Secretary of Labor unless modified or vacated by the Secretary within 30 days after it is served.

Charles P. Rippey

CHARLES P. RIPPEY
Administrative Law Judge

Dated: DEC 2 1985

Washington, D.C.

CPR:WLS:bdw: 106-l

CERTIFICATE OF SERVICE

Case Name: Illinois Migrant Council v. U.S. Dept. of Labor

Case No. 840JTP-10

Title of Document: Decision and Order

I certify that a copy of the above-mentioned document was mailed to the following parties:

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